Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

LORILLARD, INC.,

Petitioner,

v.

MILTON HOROWITZ and SHIRLEY HOROWITZ,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

PETITION FOR A WRIT OF CERTIORARI

KEVIN J. DUNNE
Counsel of Record
FREDERICK D. BAKER
KIRK C. JENKINS
SEDGWICK, DETERT, MORAN & ARNOLD
1600 One Embarcadero Center
San Francisco, California 94111
Telephone: (415) 781-7900

WILLIAM S. OHLEMEYER
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-6550

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Petitioner is the distant successor-in-interest, following several mergers, of a corporation that manufactured an allegedly defective product from 1952 until 1956. The Court of Appeal of California ruled that petitioner is liable for $560,000 in punitive damages, based solely upon the conduct of its distant predecessor and without any proof of independent wrongdoing by the petitioner. The question presented is:

Under what circumstances, consistent with the due process clause of the Fourteenth Amendment, may a successor corporation be held liable for punitive damages based solely upon the conduct of a predecessor corporation, without proof of any independent wrongdoing by the successor?

LISTING OF PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeal of California were:

Plaintiffs/Respondents:

Milton Horowitz

Shirley Horowitz

Defendants/Appellants:

Lorillard, Inc.

Hollingsworth & Vose Company

RULE 29.6 STATEMENT

Petitioner Lorillard, Inc. states that Lorillard, Inc. is a wholly owned subsidiary of Loews Corporation. Lorillard, Inc. has no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Lorillard, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of California.

OPINIONS BELOW

The opinion of the trial court respecting punitive damages was delivered orally and transcribed by the court reporter. (App., *infra*, p. 37a) The opinion of the Court of Appeal of California (App., *infra*, p. 1a) is unreported. The order of the Supreme Court of California denying discretionary review (App., *infra*, p. 39a) is unreported.

JURISDICTION

The decision of the Court of Appeal of California was filed August 12, 1997. (App., *infra*, p. 1a.) The Supreme Court of California denied discretionary review of the Court of Appeal's decision on November 12, 1997. (App., *infra*, p. 39a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 14

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Corporations Code, § 1107. Effect of merger; rights of creditors; liens; pending actions or proceedings.

(a) Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each of the same manner as if the surviving corporation had itself incurred them.

(b) All rights of creditors and all liens upon the property of each of the constituent corporations shall be preserved unimpaired, provided that such liens upon property of a disappearing corporation shall be limited to the property affected thereby immediately prior to the time the merger is effective.

(c) Any action or proceeding pending by or against any disappearing corporation may be prosecuted to judgment, which shall bind the surviving corporation, or the surviving corporation may be proceeded against or substituted in its place.

INTRODUCTION

From 1952 until 1956, P. Lorillard Company – a New Jersey corporation that ceased to exist more than thirty years ago – manufactured cigarettes that employed a filter which contained, among other things, asbestos. The evidence at trial was undisputed that in the early 1950's asbestos was a state-of-the-art filtering medium; it was widely used in military gas masks, hospital operating rooms and Atomic Energy Commission facilities. RT 1686. There was *no* evidence that *any* physician or scientist in the 1950's believed that the use of asbestos in these sorts of circumstances posed a health risk. RT 1686-88. Indeed, an article was published in the July 4, 1953 edition of the Journal of the American Medical Association (Def. Exh. N) which discussed at length P. Lorillard Company's asbestos-containing cigarette filter. There was *no suggestion* – either in the article itself or in response to the article – that any physician or scientist was concerned that the presence of asbestos in the filter raised health concerns.

P. Lorillard Company stopped producing asbestos-containing filters in 1956 for economic reasons – a new filter had been developed that was equally effective and could be produced much less expensively using other materials. There is absolutely no evidence that P. Lorillard Company, or any of its corporate successors, ever again contemplated using asbestos in cigarette filters.

In 1968 – twelve years after it last made an asbestos-containing filter – P. Lorillard Company merged into and with Lorillard Corporation. Shortly thereafter in 1968,

Lorillard Corporation was acquired by Loews Theatres, Inc., an entirely unrelated third party. There is *no* evidence that *anyone* at Loews Theatres, Inc. then believed that P. Lorillard Company's asbestos-containing filters had, would, or were capable of harming anyone.

Through various mergers and reorganizations, the name "Lorillard" survived as a part of the title of several business entities. Lorillard Corporation was a wholly-owned subsidiary of Loews Theatres, Inc., then, following a merger, a division of Loews Theatres, Inc., then, after Loews Theatres, Inc. became a subsidiary of Loews Corporation in August 1985, the name of Loews Theatres, Inc. was changed to Lorillard, Inc.

On December 19, 1994, Milton Horowitz sued Lorillard, Inc. claiming he had been injured by asbestos allegedly inhaled while smoking P. Lorillard Company cigarettes between 1952 and 1956. On August 31, 1995 a jury awarded Horowitz $1,050,000 in compensatory damages. The following day, after being told by Horowitz's lawyer that Lorillard, Inc. should be punished on the basis of its current net worth, the jury returned a verdict assessing $560,000 in punitive damages against Lorillard, Inc.

There was no evidence – none whatsoever – that any officer, director, manager, or employee of P. Lorillard Company who was involved forty years ago in the design, production, or sale of the filter which purportedly caused Horowitz's injuries has any connection with Lorillard, Inc.

Punitive damages lawfully may be assessed to serve two purposes: to punish the defendant for past conduct,

and to deter future similar conduct. Here, it cannot rationally be disputed that (1) the present-day corporation known as Lorillard, Inc. had no involvement in the allegedly tortious conduct of P. Lorillard Company in the 1950's; and (2) there has been no thought of repeating that conduct in the four following decades, or in the future. Who is being punished? What is being deterred?

The question for the Court is: Consistent with the due process clause, may a successor-in-interest to an alleged wrongdoer be assessed punitive damages based upon the conduct of its predecessor solely as a result of the form of the corporate transaction by which it acquired the predecessor? The Fourth and Fifth Circuits, the Supreme Courts of Rhode Island and Florida and several Federal and state lower courts, including the California Court of Appeal here, have answered "yes." The Sixth Circuit, the Supreme Courts of West Virginia and Wisconsin, and several other Federal and state lower courts have answered "no," holding that more is required to make an award of punitive damages against the successor permissible. Where there is no indication that the transaction was entered into to avoid punitive liabilities, and where the goals of punishment and deterrence of wrongdoing cannot be served, imposition of punitive damages on such successor corporations violates the principles of fundamental fairness embodied in the due process clause.

This Court should step in and resolve the twenty-year-old conflict of authority described below.

STATEMENT OF THE CASE

A. THE UNDERLYING FACTS

In August 1994 Milton Horowitz was told he was suffering from mesothelioma. RT at 1098. When he was told of his diagnosis by his personal physician, the doctor asked Horowitz whether he had been exposed to asbestos. *Id.* at 1098-99. Horowitz related several possible sources of asbestos exposure. First, Horowitz was aboard a World War II troop ship. *Id.* at 1099-1100. Second, Horowitz worked near a construction site in Ohio; he thought this might have resulted in exposure to asbestos. *Id.* at 912, 1101. Third, he believed he might have been exposed to asbestos during a remodeling project at his home. *Id.* at 1102. Fourth, Horowitz speculated that he might have been exposed to asbestos while working near another construction project in California. *Id.* at 1101. Finally, Horowitz testified that he might have been exposed to asbestos when asbestos-containing pipes and ducts were removed from his home. *Id.* at 1102.

B. THE LAWSUIT

Horowitz filed a complaint on November 16, 1994 which named fifty-four corporate defendants who were asbestos manufacturers and installers. CT at 1. It purported to state claims for negligence, strict liability, enterprise liability, false representation, loss of consortium and punitive damages. *Id.*

The following month, at the request of plaintiffs' counsel, Horowitz was examined by Dr. Barry Horn, who eventually testified at the trial as an expert witness. RT at 910, 1102. Dr. Horn asked Horowitz about his smoking

history. When Horowitz reported that he had smoked Kent cigarettes, which were manufactured by P. Lorillard Company, a corporate predecessor-in-interest of defendant Lorillard, Inc., Dr. Horn asked him whether he was aware that the Kent filter had contained asbestos for a time. *Id.* at 1102. According to Dr. Horn, Horowitz said that he had smoked Kent cigarettes from 1952 until 1963. *Id.* at 925.

On December 19, 1994, plaintiffs moved for leave to file an amended complaint adding Lorillard, Inc. as a defendant and purporting to state a claim for fraud. CT at 24; *see* CT at 32. Following the dismissal of nearly all of the corporations initially sued by Horowitz (he had received settlements from a number of them), trial of the action began with opening statements on August 9, 1995. RT at 351. On August 31, 1995, the jury returned a verdict for the compensatory phase of the trial awarding Horowitz $1,050,000 in compensatory damages. RT at 2266-2307; CT at 1584-1596.

C. THE PUNITIVE DAMAGES PHASE

Lorillard, Inc. then moved for non-suit or directed verdict on Horowitz's claims for punitive damages, arguing that awarding punitive damages against Lorillard, Inc., a distant successor of the company who had manufactured and sold asbestos-containing Kent cigarettes, without any proof of wrongdoing by Lorillard, Inc. itself, would violate the due process clause of the United States Constitution. CT 1566-77, 1748-55; RT 2308-10, 2313-14.

The court deferred a decision on the motion, and brief arguments were then made to the jury respecting

punitive damages. During those arguments, despite having argued to the court that an award of punitive damages would be fair because it would actually be directed against P. Lorillard Company, with Lorillard, Inc. acquiring that punitive liability by operation of law when it acquired its predecessor years later, counsel for Horowitz repeatedly urged the jury to punish Lorillard, Inc., not its corporate predecessor:

> The net worth of Lorillard [Inc.] is $402,195,000 . . . [I]n order to punish a company, you can't give them a two-dollar fine. Because a two-dollar fine to a $402,000,000 company is like slapping them on the pinky . . . You've got to send a large enough message for it to have an effect . . . [The defendants] are both still marketing products. They are both still out there selling things. And if you send them a message that says it's okay to do this, then the message gets passed on to the products that they sell today and that they sell into the future, and that is something that shouldn't be done.

RT at 2325, 2327.

Counsel also read into the record Lorillard, Inc.'s response to an interrogatory, describing in detail the history which led from P. Lorillard Company, the predecessor who manufactured and sold asbestos-containing Kent cigarettes, to Lorillard, Inc.:

> Lorillard [Inc.] states that P. Lorillard Company, a corporation incorporated in the state of New Jersey, manufactured and sold Kent cigarettes with asbestos-containing filter media. In April 1968, P. Lorillard Company merged with and

> into Lorillard Corporation, a corporation organized and existing under the laws of the State of Delaware. In November 1968, Loews P. L. Company, Inc., a wholly-owned subsidiary of Loews Theaters, Inc., a New York corporation, merged with and into Lorillard Corporation, a Delaware corporation. Upon consummation of the merger, the separate existence of Loews P. L. Company, Inc. ceased, and Lorillard Corporation became a wholly-owned subsidiary of Loews Theaters, Inc. In July 1969, Lorillard Corporation merged with and into Loews Theaters, Inc. Thereafter, it operated as Lorillard, a division of Loews Theaters, Inc. In 1971 Loews Theaters, Inc. became a subsidiary of Loews Corporation and in August 1985, the name of Loews Theaters, Inc. was changed to Lorillard, Inc.

RT 2328-29.

The following day, the jury returned a verdict assessing $560,000 in punitive damages against Lorillard, Inc. RT at 2352-55; CT at 1713-15. On September 15, 1995, the trial court denied Lorillard, Inc.'s motion for non-suit or directed verdict on punitive damages without opinion. RT, 9/15/95, 1-2.

D. THE APPELLATE DECISION

Lorillard, Inc. appealed on numerous grounds, renewing its argument that the imposition of punitive damages against a successor corporation without proof of independent wrongdoing violated the due process clause. The Court of Appeal affirmed the judgment.

In rejecting Lorillard, Inc.'s due process challenge, the Court of Appeal noted the existence of a conflict of

authority on the issue. In *Marks v. Minnesota Mining & Manufacturing Co.*, 187 Cal.App.3d 1429, 1438 (1986), the California Court of Appeal had held that a successor corporation automatically succeeded to the punitive liabilities of its predecessor by operation of California Corporations Code § 1107, the state's merger statute. On the other hand, in *In re Related Asbestos Cases*, 566 F.Supp. 818, 821-24 (N.D.Cal. 1983), the United States District Court for the Northern District of California held that a successor corporation would not be held liable for the conduct of its predecessor where the successor was not a *"mere continuation"* of the predecessor corporation, continuing the offending conduct with largely identical personnel. (App., *infra*, pp. 25a-26a.)

The Court of Appeal endorsed the reasoning and result of *Marks*, rejecting *In re Related Asbestos Cases*, holding that the form of the corporate transaction by which a successor acquired an alleged wrongdoer should govern over the nature of the relationship between the companies or proof of independent wrongdoing by the successor. *Id.*, p. 27a.

REASONS FOR GRANTING THE WRIT

The explosive growth in large punitive damage awards, particularly in products liability cases, has been noted by this Court in a series of decisions during the past ten years. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court addressed the issues raised by this recent development in tort law for the first time. Four Justices expressly stated

their view that punitive damage awards implicate the due process clause of the Fourteenth Amendment. *Id.* at 280 (Justices Brennan and Marshall, concurring); 283 (Justices O'Connor and Stevens, concurring and dissenting.)

In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), six Justices agreed that under an appropriate set of facts, an award of punitive damages could violate the due process clause. *Id.* at 18-19; 44 (Justice O'Connor, dissenting). At least five Justices endorsed the same proposition in *TXO Production Co. v. Alliance Resources Corp.*, 509 U.S. 443, 455 (1993) (plurality opinion), 479-80 (Justices O'Connor and White, dissenting), and seven Justices agreed in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994). Most recently, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court reversed a judgment awarding punitive damages on the ground that it violated the due process clause.

However, a related issue of considerable importance has not yet been addressed by this Court. A wave of corporate acquisitions and mergers has dominated the American economy during the last two decades, nearly concurrent with the trend towards ever-larger punitive damage awards.

The result has been inevitable. Consumers have suffered personal injuries as a result of products manufactured or designed by companies who have since disappeared as a result of corporate mergers. Or even more troubling, toxic tort plaintiffs have alleged that they were harmed by products which they used many years, even decades earlier – products whose manufacturers

and designers have been the subject of not just one, but multiple mergers and asset purchases.

The courts have dealt with successor liability for compensatory damages with relatively little controversy. Using common law exceptions to the general rule of non-liability originally fashioned for the protection of creditors of predecessor corporations, the courts have had little trouble in holding successors liable for compensatory damages so that injured consumers will not be left without a remedy for their injuries.

But successor liability for punitive damages has presented more difficult issues. At first, courts mechanically applied the same rules they had fashioned with respect to compensatory damages, holding that the form of the transaction by which a successor acquired its predecessor governed the availability of punitive damages, and appearing to give little or no consideration to the due process or public policy issues involved. *Thomas v. E.J. Korvette, Inc.*, 329 F.Supp. 1163, 1169-70 (E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (3d Cir. 1973); *Moe v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 289, 304 (1971).

But by the late 1970s, as awards of punitive damages became larger and far more common, a split in authority began to develop. Courts noted that punitive damages are justified only for purposes of punishing wrongdoing and deterring future wrongful conduct, and many courts found that the mechanical application of the old, common law rules relating to successor liability to punitive damages did not serve those public policy purposes, and was thus fundamentally unfair to the successor corporation.

That split in authority merits this Court's attention. From traditional products liability cases to latent disease cases, consumers are frequently alleging they have been injured by products manufactured or designed by corporations long since defunct. Unless the split in authority is resolved, the availability of punitive damages in such cases will depend on what jurisdiction a plaintiff files suit in. This Court should resolve the split by holding that the imposition of punitive damages on a corporate successor in circumstances such as those presented here, with no proof of independent wrongdoing, no chance that the public policy goals of punishing wrongdoers and deterring future wrongful conduct will be advanced, and no indication that the transactions were entered into to avoid punitive liabilities, is fundamentally unfair and violates the due process clause.

I. THERE IS A SPLIT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT REGARDING THE CIRCUMSTANCES IN WHICH AN INNOCENT SUCCESSOR OF A CORPORATE WRONGDOER MAY PROPERLY BE ASSESSED PUNITIVE DAMAGES

Drayton v. Jiffee Chemical Corporation, 591 F.2d 352 (6th Cir. 1978) involved an allegedly defective liquid drain cleaner which burned a small child. The District Court noted that the manufacturer of the drain cleaner had been acquired by another corporation shortly after the accident, who had reformulated the product, removing the alleged defect. Further, the individuals who had been guilty of wrongful conduct while employed by the predecessor were not employed by the successor corporation.

Finally, the District Court noted that the alleged defect in the drain cleaner did not appear to be common in the industry as a whole. For all these reasons, the District Court concluded that the successor should not be punished for its predecessor's conduct, and that a punitive damages award against the successor would have no deterrent effect because there was no ongoing conduct to defer. *Drayton v. Jiffee Chemical Corporation*, 395 F.Supp. 1081, 1098 (N.D. Ohio 1975). The Sixth Circuit agreed with the District Court's resolution of the issue, finding that the court had properly understood and applied Ohio law. *Drayton*, 591 F.2d at 366.

The Sixth Circuit reaffirmed *Drayton* in *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). For nearly nine years, a predecessor of the defendant had dumped chemicals at a toxic waste dump. *Id.* at 1192. Twelve years after the dumping ceased, an unrelated third party acquired the predecessor's parent company, thus acquiring the predecessor itself. The successor defendant argued that it would be unfair to assess punitive damages against it without proof of independent wrongdoing. "This court has cautioned that the award of punitive damages is inappropriate where the successor corporation was a new and different entity and where the successor corporation and its owners are wholly innocent of the allegedly unlawful activities," the Court wrote, citing *Drayton*. *Id.* at 1215, n. 27.[1]

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[1] The Court found, however, that the defendant had not satisfied the rule of *Drayton* because there was no evidence in the record that the objectionable practices had ceased under the successor. *Id.*

Davis v. Celotex Corp., 187 W.Va. 566, 420 S.E.2d 557 (1992) involved asbestos injuries allegedly suffered by a plumber-pipefitter. The products to which the decedent had been exposed were manufactured by Philip Carey, a corporate predecessor of defendant Celotex. However, Celotex had manufactured and sold asbestos-containing insulation in the years following the acquisition of Carey – indeed, that was the purpose of the acquisition. 187 W.Va. at 573, 420 S.E.2d at 564. Moreover, Celotex apparently had not remedied the alleged defects of its product.

The Supreme Court of West Virginia noted that West Virginia law provided (as does California law) that a successor automatically acquires the liabilities of its predecessor in a merger. 187 W.Va. at 571, n.5, 420 S.E.2d at 562, n.5. The court described the split in authority about the imposition of punitive damages on a corporate successor, acknowledging that several courts had held that statutes such as West Virginia's applied to punitive as well as compensatory liabilities. 187 W.Va. at 572-73, 420 S.E.2d at 563-64.

Nevertheless, the *Davis* court rejected the mechanical assessment of punitive damages against innocent successors:

> [N]ot . . . every acquisition or merger will automatically result in punitive damage liability . . . [W]e conclude that when a corporation acquires or merges with a company manufacturing a product that is known to create serious health hazards, and the successor corporation continues to produce the same product in the same manner, it may be found liable for punitive damages for liabilities incurred by the

> predecessor company in its manufacture of such product.

187 W.Va. at 573, 420 S.E.2d at 564.

Wussow v. Commercial Mechanisms, Inc., 97 Wis.2d 136, 293 N.W.2d 897 (1980) was a product liability action against the manufacturer of a baseball pitching machine. About a year after the machine was sold to the school district where it eventually caused the plaintiff's injuries, the manufacturer was acquired by a third party in an asset purchase transaction. 97 Wis.2d at 140, 293 N.W.2d at 900. As in *Davis*, the successor corporation had actual knowledge both of the alleged defect and of other injuries and lawsuits arising from it, 97 Wis.2d at 152, 293 N.W.2d at 906, but failed to remedy the defect. 97 Wis.2d at 153, 293 N.W.2d at 906. Indeed, the opinion implies that the successor corporation may have itself manufactured the defective product for a time after the merger. 97 Wis.2d at 155, 293 N.W.2d at 906-07. Noting that all of the predecessor's directors were also directors of the successor corporation and relying heavily upon the evidence of misconduct by the successor corporation (rather than relying upon the form of the corporate transaction), the court approved the imposition of punitive damages against the successor. 97 Wis.2d at 153-156, 293 N.W.2d at 906-07.[2]

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[2] Several lower Federal and state courts have endorsed the approach of the Sixth Circuit and Supreme Courts of West Virginia and Wisconsin. (*See Bowen v. W.R. Grace & Co.-Conn.*, 781 F.Supp. 682, 683 (D. Mont. 1991); *In re Related Asbestos Cases*, *supra*, 566 F.Supp. at 821-23, 827 (policy considerations strongly militated against mechanical assessment of punitive damages

The courts who have lined up over the past two decades on the opposite side of this split of authority have overwhelmingly focused on state statutes providing that successors in a merger acquire all the liabilities of their predecessors, including punitive damages. In other words, these courts have understood the due process challenge to be merely a matter of **notice**, and have failed to address the possibility that such damages may nevertheless be substantively unconstitutional.

Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1094-95 (5th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992) was yet another case involving Celotex and its corporate predecessor, Philip Carey. In response to Celotex's argument that it would be unfair to hold it responsible for acts by Carey over which it had no control, the Fifth Circuit noted that Carey's liabilities were passed to an intermediate corporation as a result of a merger pursuant to Texas

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against successors; since defendant was not a "mere continuation" of its predecessor; no punitive damages permitted); *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 370-71, 469 A.2d 655, 666-67 (1983), *vacated on other grounds*, 508 Pa. 154 n.16, 494 A.2d 1088 n.16, ("punitive damages are recoverable against a successor corporation when the plaintiff has shown such a degree of identity of the successor with its predecessor as to justify the conclusion that those responsible for the reckless conduct of the predecessor will be punished, and the successor will be deterred from similar conduct"); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 156-57, 493 A.2d 1337, 1341 (1985) (adopting *Martin* test); *Sheppard v. AC&S, Inc.*, 484 A.2d 521, 526 (Del. 1984) (commenting that each claim for punitive damages against a successor "must turn on its particular facts," court declined to rule out punitive damages based upon evidence defendant had continued to market the product with knowledge of its dangers).)

law, and Celotex then expressly agreed to assume "all debts, liabilities and duties" of its predecessor when it purchased the assets of that intermediate corporation.

City of Richmond v. Madison Management Group, Inc., 918 F.2d 438 (4th Cir. 1990) was a case involving claims for breach of contract and fraud arising from allegedly defective concrete pipe. The court affirmed an award of punitive damages against the successor because (1) it saw no reason why punitive damages should be treated differently from compensatory damages in analyzing successor liability; (2) general deterrence would still be served by punishing the successor, even though it was not the actual wrongdoer; and (3) entities should not be permitted to escape liability for punitive damages by simply transferring their assets to another company.[3] *Id.* at 455-56.

Douglas v. Bank of New England/Old Colony, 566 A.2d 939 (R.I. 1989) involved claims that a bank had mismanaged a trust estate. Some years after the misconduct at issue, but before the lawsuit commenced, the predecessor bank entered into a merger agreement with the defendant bank. The Supreme Court of Rhode Island found the

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[3] The court is knocking down a straw man here. No court on either side of this dispute has ever suggested that evidence that a corporate transaction was undertaken in order to avoid punitive liability for wrongdoing would not be relevant in assessing punitive liability against the successor. The common law has long held that fraud is an exception to the general rule that a successor corporation is not liable for the liabilities of its predecessor. *Davis v. Celotex Corp.*, 187 W.Va. at 571, 420 S.E.2d at 562.

successor bank was properly subject to punitive damages based upon its predecessor's conduct. *Id.* at 941.

In *Celotex Corp. v. Pickett*, 490 So.2d 35 (Fl. 1986), the Supreme Court of Florida upheld an award of punitive damages. The court found that the successor corporation was properly punished because after a merger, the predecessor continues to exist within the successor.[4] *Id.* at 38. Further, the court found the goal of deterrence would be served by imposing punitive damages on an innocent successor because buyers would then avoid purchasing corporate wrongdoers and wrongdoers would be deterred by the fear that their value in a corporate takeover would be diminished. *Id.*[5]

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[4] California law is to the contrary: "Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases." California Corporations Code, § 1107(a).

[5] Several lower Federal and state courts have endorsed the approach taken by the Fourth and Fifth Circuits and the Supreme Courts of Rhode Island and Florida. (*See Man v. Raymark Industries, Inc.*, 728 F.Supp. 1461, 1470-71 (D.Haw. 1989); *Krull v. Celotex Corp.*, 611 F.Supp. 146, 149 (N.D.Ill. 1985); *Wall v. Owens-Corning Fiberglas Corp.*, 602 F.Supp. 252, 255 (N.D. Tex. 1985); *Hanlon v. Johns-Manville Sales Corp.*, 599 F.Supp. 376, 378 (N.D. Iowa 1984); *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357, 391 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481 (3d Cir. 1985).) The Court of Appeal in the present case relied heavily upon the decision in *Marks v. Minnesota Mining & Manufacturing Co., supra*, 187 Cal.App.3d 1429. There, the court merely applied the settled common-law exceptions to the rule of successor nonliability, finding that the transactions amounted to a *de facto* merger, and found the successor corporation liable for punitive damages, without any consideration of the policy goals served by imposition of punitive damages or the fundamental unfairness of the result. *Id.* at 1438.

The split in authority about successor liability for punitive damages has attracted the attention of commentators. Keith A. Ketterling, writing in the Journal of Corporation Law, criticized the mechanical application of the old common-law rules of successor liability to punitive damage situations without analysis of the purposes served by such awards. Ketterling, Keith, "A Proposal For the Proper Use of Punitive Damages Against A Successor," 11 Journal of Corporation Law 765 (1986). Ketterling suggests two possible tests for determining when an award of punitive damages against a successor corporation meets standards of fundamental fairness. First, he proposes a modified version of the test suggested in *Martin v. Johns-Manville*, the "degree of identity" test. Where shareholders, officers, directors and management personnel of the wrongdoer/predecessor have been incorporated into the defendant/successor to so great a degree that one can conclude that those responsible for the reckless conduct of the predecessor will be reached by punishment of the successor, punitive damages are properly assessed. *Id.* at 783-85. Second, he proposes a "conduit-potential" test by which successors would be held liable for the amount of punitive liability which they could be expected to reasonably foresee and account for in the purchase price of the predecessor. Ketterling argues that the "conduit-potential" test should be applied prospectively only, so that successors are not held liable without notice that they will be required to account for punitive liabilities in their corporate transactions. *Id.* at 786. Another commentator endorsed Ketterling's proposals and added a third "totality of the circumstances" test, commenting that courts should weigh whether the

permissible goals of punishment and deterrence are advanced by the imposition of punitive damages in a particular case. Wilson, Lynda G., "Corporate Successor Liability for Punitive Damages in Products Liability Litigation," 40 South Carolina Law Review 509, 538-543 (1989).

II. THE IMPOSITION OF PUNITIVE DAMAGES WITHOUT PROOF OF INDEPENDENT WRONGDOING BY A SUCCESSOR CORPORATION VIOLATES DUE PROCESS PRINCIPLES ANNOUNCED BY THIS COURT

This Court has frequently stated that the Due Process clause of the Fourteenth Amendment imposes substantive limits "beyond which penalties may not go." *TXO Production Corp. v. Alliance Resources Corp., supra,* 509 U.S. at 453-54 (collecting cases); *see Standard Oil Co. of Ind. v. Missouri,* 224 U.S. 270, 286 (1912) (Power to impose penalty "is limited by the obligation to administer justice, and to no more assess excessive damages than to impose excessive fines.")

One of those limits is that penalties may not be imposed against parties who have done nothing wrong, particularly where the imposition of the penalty cannot advance any permissible societal goal.

For example, in *Southwestern Telegraph & Telephone Co. v. Donaher,* 238 U.S. 482 (1915), the Court ruled that a statutory penalty imposed on a telephone company violated the due process clause:

> There was no intentional wrongdoing, no departure from any prescribed or known standard of

> action, and no reckless conduct . . . In these circumstances to inflict upon the company penalties . . . was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law.

Id. at 490-91; *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (Considering whether the Civil Rights Act of 1871 permitted the imposition of punitive damages against a municipality, the Court observed: "Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers"); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional' ".)

Indeed, although this Court has not to date considered the constitutional implications of imposing punitive damages against an innocent successor corporation, the Court's landmark opinions on punitive damages have all implicitly assumed that the defendant has either personally been guilty of blameworthy conduct, or was in a position to control those who committed the wrongful acts. *Pacific Mutual Life Ins. Co. v. Haslip, supra*, 499 U.S. at 21 (approving an Alabama jury instruction which directed that the jury consider "the degree of reprehensibility of the defendant's conduct" and the relationship between the punitive damages award and the "harm likely to result from the defendant's conduct as well as the harm that actually has occurred"); *TXO Production*

Corp. v. Alliance Resources Corp., supra, 509 U.S. at 462 (approving a punitive damages award in part because of the magnitude of the damage defendant's conduct might have caused); *BMW of North America, Inc. v. Gore, supra,* 517 U.S. 559, 116 S.Ct. at 1599-1603 (holding that the degree of reprehensibility of defendant's conduct, the ratio between the punitive award and the harm done by the defendant, and the magnitude of civil or criminal penalties which could be imposed for similar misconduct are all relevant to determining whether a punitive damages award is constitutionally excessive.)

The decision of the California Court of Appeal affirming an award of punitive damages in this case flagrantly violates these long-settled principles of due process. Lorillard, Inc.'s predecessor-in-interest, P. Lorillard Company, manufactured and sold asbestos-containing filters for one brand of its cigarettes for four years, between 1952 and 1956. Once production of the asbestos-containing filter ceased in 1956, it was never resumed. It was not until twelve years later, in November 1968, that the company was purchased by an entirely unrelated third party, Loews P. L. Company, Inc. RT 2328-29. There is no evidence that anyone at Loews then believed that P. Lorillard's asbestos-containing filter was capable of harming anyone. At no time since, through the various mergers and reorganizations which have led from that purchase to petitioner Lorillard, Inc., has production of asbestos-containing filters resumed.

Petitioner Lorillard, Inc. has done nothing wrong. Lorillard, Inc. did not design, manufacture or market the cigarette filter at issue here. Lorillard, Inc. had no control over the individuals who were guilty of the allegedly

wrongful conduct. Under those circumstances, the imposition of punitive damages against Lorillard, Inc. violates well-settled tenets of fundamental fairness and is thus barred by the due process clause.

III. THERE IS NO PUBLIC POLICY JUSTIFICATION FOR THE IMPOSITION OF PUNITIVE DAMAGES AGAINST A CORPORATE SUCCESSOR IN INTEREST WITHOUT PROOF OF INDEPENDENT WRONGDOING

This Court has made it clear that the imposition of punitive damages in a civil suit is subject to careful judicial review, with the court confirming that an award of punitive damages under all the circumstances presented in the case would be fundamentally fair. *See BMW of North America, Inc. v. Gore, supra,* 517 U.S. 559, 116 S.Ct. at 1599-1603; *see also Honda Motor Co., Ltd. v. Oberg, supra,* 512 U.S. at 421-26, 432 (noting that judicial review of punitive damage awards for excessiveness has been an important safeguard against impermissible awards for as long as punitive damages have been awarded, and holding that amendment to state constitution strictly limiting judicial review violates the due process clause).

An award of punitive damages under circumstances such as those presented here cannot survive such careful review. It is well settled that the purpose of awarding punitive damages is not to compensate the plaintiff, but to punish the tortfeasor and to deter him and others from similar conduct. *City of Newport v. Fact Concerts, Inc.,*

supra, 453 U.S. at 266-67; *Dyna-Med, Inc. v. Fair Employment and Housing Com'n*, 43 Cal.3d 1379, 1387-88 (1987); *see* Restatement (Second) of Torts § 908 (1979).

One possible justification for the mechanical rule that a merger always results in the passing of punitive liabilities is that the predecessor/wrongdoer has been absorbed by the successor and continues to exist within the new company, and punishing the successor therefore constitutes punishing the predecessor. Leaving aside the fact that this is a transparently conclusory fiction, California law is directly to the contrary. California Corporations Code § 1107(a). The fiction is particularly weak where, as here, twelve years passed between the cessation of the allegedly wrongful conduct and the purchase of the predecessor company, and another twenty-five years elapsed before litigation was commenced.

A second possible justification for this mechanical rule is that the court is simply ratifying the transaction and the will of the parties by awarding punitive damages. But the unspoken assumption behind the decisions of courts who have noted that parties had "molded their own destinies" by choosing a statutory merger rather than a combination which will not result in the passing of liabilities is that the acquiring corporation is aware of the punitive liabilities of the target corporation, and that those liabilities can be estimated at least approximately so that they may be accounted for in the price. If a target corporation succeeds in hiding its potential liabilities from the acquiring corporation, those liabilities will ***not*** be built into the price, and the burden of later punitive damages will fall on the innocent acquiring corporation. Also, the result will be fundamentally unfair where the

present value of the target's punitive liabilities exceeds the total value of the target corporation. Under those circumstances, the value of the target is zero, and the innocent acquiring corporation will bear the burden of paying punitive damages.

Turning to the facts here, application of the merger rule applied by the California Court of Appeal is fundamentally unfair and serves neither of the purposes of punitive damages. The existence of Lorillard, Inc.'s predecessor, P. Lorillard Company, terminated at the time of the 1968 merger, so an award of punitive damages in 1997 does not result in the punishment of that long-defunct alleged wrongdoer. There is no reason why Lorillard, Inc.'s predecessor Loews should have been expected to factor punitive liabilities of the alleged wrongdoer which would not be assessed for nearly thirty years into the purchase price for the company in 1968; even if the company could have somehow predicted the trend towards skyrocketing punitive damage awards, a trend which began in the late 1970s, punitive damages are based in part upon the wealth of the company, and there would have been no basis for guessing in 1968 what the wealth of the successor corporation in 1997 would be. There is no evidence that Loews had (or should have had) any concern in 1968 that P. Lorillard Company's asbestos-containing filter would result in product liability actions, let alone a large punitive damages award.

Nor can the second goal of deterrence be served by a punitive damage award. The allegedly wrongful conduct stopped many years before Lorillard, Inc. acquired the alleged wrongdoer, so there is no wrongful conduct by Lorillard, Inc. to deter. Nor can general deterrence be

served by such an award. Wrongdoers are deterred only by seeing the punishment of another wrongdoer, not that of an innocent party. Ketterling, Keith A., "A Proposal For the Proper Use of Punitive Damages Against A Successor," *supra*, 11 Journal of Corporate Law at 774. Besides, if general deterrence were an acceptable justification for punishing an innocent successor, the demise of a wrongdoer would leave a court free to impose punitive damages on *anyone*, including a stranger to the dispute.[6] But the state has no legitimate interest in the punishment of a party who is not guilty of wrongdoing. *United States v. United States Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring).

This Court should grant the petition, resolve the split of authority, and reverse the California Court of Appeal, holding that because the policy goals of punishment and deterrence of wrongdoing cannot be served by the imposition of punitive damages on a successor corporation without proof of independent wrongdoing by the successor, the imposition of such damages violates the principles of fundamental fairness embodied in the due process clause.

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[6] Counsel for the Horowitzes argued during the punitive damages phase of the trial that Lorillard should be subjected to punitive damages because "[t]hey are . . . still out there selling things." RT at 2327. She failed to acknowledge or explain how this differentiated the innocent successor corporation Lorillard from anyone else who could be subjected to punitive damages in frustration because the manufacturer of asbestos-containing Kent cigarettes ceased to exist thirty years ago.

CONCLUSION

The imposition of punitive damages against petitioner Lorillard, Inc. in this case serves no legitimate purpose and violates long-settled principles of fundamental fairness. The award cannot stand due process analysis. The petition for a writ of certiorari should be granted and the twenty-year-old split of authority among the circuits and state courts of last resort resolved.

Respectfully submitted,

KEVIN J. DUNNE
Counsel of Record
SEDGWICK, DETERT, MORAN & ARNOLD
Counsel for Petitioner Lorillard, Inc.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MILTON HOROWITZ et al.,	)
Plaintiffs and Respondents,	) **A072695**
	)
vs.	) **(San Francisco County**
LORILLARD, INC., et al.,	) **Super. Ct. No. 965245)**
	)
Defendants and Appellants.	) (Filed Aug. 12, 1997)
	)

Defendants/appellants Lorillard, Inc. (Lorillard) and Hollingsworth & Vose Company (H&V) appeal a judgment on special verdict in an action brought by plaintiffs/appellants Milton and Shirley Horowitz for personal injuries arising from Milton smoking cigarettes manufactured by appellants containing filters comprised of asbestos material.[1] We affirm.

Background

Between March 1952 and May 1956 Lorillard's predecessor, P. Lorillard Company (P. Lorillard), manufactured and sold more than 13 billion Kent cigarettes with "Micronite" filters containing crocidolite asbestos. In 1956

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[1] Milton Horowitz died on March 31, 1996, during the pendency of this appeal.

appellants ceased producing Kent asbestos-containing filter cigarettes because nonasbestos filters were less expensive to produce and had an easier "draw." Between February 1952 and May 1956 H&V manufactured and supplied P. Lorillard with the bulk asbestos-containing filter material used in the Kent filter cigarettes.

In August 1994 Milton, a clinical psychologist, was diagnosed with mesothelioma, a type of lung cancer resulting from asbestos exposure. He began smoking cigarettes in 1944 and smoked various brands until the spring of 1952 when be began smoking regular size Kent filter cigarettes. In 1954 he switched to smoking king size Kent filter cigarettes, which he continued to smoke until he quit smoking in January 1963. He smoked about one pack of cigarettes per day. He began smoking Kent cigarettes because of advertising which suggested they were "safe," "good for one's health" and more successful at filtering out tar and nicotine, and because his physician friends were convinced "Kents were the cigarette[s] to smoke."

Other than his exposure to asbestos-containing Kent cigarettes, Milton related the following potential asbestos exposure history: In 1946, while in the military, he spent 13 days aboard a troop ship in poor condition, with asbestos-containing steam pipes which vibrated, releasing asbestos fibers. Between 1954 and 1956 he worked in an office building located 80 to 100 feet from a construction site at which asbestos-containing building materials might have been used, and walked past the site while construction work was in progress. In 1964 he moved to California and between 1966 and 1968 may have been exposed to asbestos-containing building materials used at

a construction site near his office. Finally, he may have been exposed to asbestos in 1987 or 1988 when asbestos-containing ducts were professionally removed from his home. However, this last exposure was ruled out as a contributing cause of his mesothelioma because his malignancy already existed by that time.

Respondents presented evidence of experiments conducted in 1954 and in the early 1990's which concluded that during human smoking of original Kent filter cigarettes manufactured between 1952 and 1956, crocidolite asbestos fibers were released into the smoke.

Several medical experts testified on behalf of respondents on the issue of causation. Pulmonologist Dr. Barry Horn testified that mesothelioma is dose dependent, i.e., the risk of contracting the disease increases with the amount of asbestos fibers inhaled and the intensity of the exposure. He also stated that exposure to crocidolite asbestos is the most carcinogenic-causing form of asbestos likely to cause mesothelioma. Horn concluded that Milton's asbestos exposure from smoking asbestos-containing filter cigarettes was the greatest factor contributing to his mesothelioma.

Pathologist Dr. Samuel Hammar concluded that Milton's asbestos exposure from inhaling Kent asbestos-containing cigarettes was the "most likely" cause of his mesothelioma.

Dr. William Nicholson, an expert in health risk assessment regarding asbestos-related disease, opined that based on a qualitative analysis of Milton's various asbestos exposures, smoking Kent asbestos-containing

cigarettes was the greatest contributing cause of his mesothelioma.

In December 1994 respondents filed their first amended complaint against appellants alleging a number of causes of action, including negligence, strict liability and fraud.

Following the first phase of trial on the issue of liability and compensatory damages the jury returned a special verdict containing the following findings: (1) appellants' Kent cigarettes with asbestos-containing filters were defective, and the defect was a cause of Milton's injury; (2) appellants' negligence was a cause of Milton's injury; (3) appellants made false representations with an intent to defraud Milton and he detrimentally relied on such representations; and (4) appellants intentionally concealed or suppressed facts with the intent to defraud Milton, causing him damage. The jury awarded Milton $1,050,000 in compensatory damages and his wife, Shirley, $250,000 for loss of consortium. It found appellants each liable for 50 percent of respondents' injuries. In the second phase on punitive damages, the jury assessed $560,000 in punitive damages against Lorillard and $140,000 against H&V.

Discussion

I

Appellants contend the court erred on relevance grounds in admitting testimony and photomicrographs regarding experiments performed in 1954 by electron microscopist Ernest Fullam. Alternatively, they argue that

even if relevant, the photomicrographs were inadmissible because they were not sufficiently authenticated.

"Admissibility of experimental evidence depends upon proof of the following foundational items: (1) The experiment must be relevant [citations]; (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence [citation]; and (3) the evidence of the experiment will not consume undue time, confuse the issues or mislead the jury [citation]. [¶] In the case of experimental evidence, the preliminary fact [citation] necessary to support its relevancy is that the experiment was conducted under the same or similar conditions as those existing when the [event in question] took place. The standard that must be met in determining whether the proponent of the experiment has met the burden of proof of establishing the preliminary fact essential to the admissibility of the experimental evidence is whether the conditions were substantially identical, not absolutely identical." (*Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521 (*Culpepper*); *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1231; accord *People v. Bonin* (1989) 47 Cal.3d 808, 847.)

A.

In January 1954 P. Lorillard hired Althea Revere and Wanda Farr to study the filter material in Kent filter cigarettes. By April 1954 Revere observed traces of asbestos in the cigarette smoke. As part of its program of "work[ing] out a method for the elimination of [asbestos] in the smoke," P. Lorillard hired Fullam in February 1954

to determine if asbestos was emitted from the filters during "normal use."

In an April 1954 letter, P. Lorillard's research director, H.B. Parmele, stated that Fullam had recently examined "Kent smoke" and confirmed Revere's earlier finding that the smoke contained traces of asbestos, and had begun to examine the smoke from over "a dozen lots of treated Kents."

In July 1954, Parmele sent Fullam 20 packages of Kent cigarettes divided into four 5-package samples, described as follows: "Sample number 1, five packages long vacuum cleaning. Sample number 2, five packages regular Kents. Sample number 3, five packages gelatin sprayed. Sample number 4, five packages new type experimental Micronite filter." Fullam was asked to observe the relative amounts of mineral fiber in the smoke from these four sample lots "following the same general technique which you used in the investigation prior to this." Parmele noted, "We are very anxious to have the smoke from our cigarettes as free of [asbestos] fiber as possible – at least as free as or as pure as the air which we normally breathe." In August Parmele complimented Fullam on his findings and the quality of his work, and indicated interest in the "results" obtained with samples three and four. However, the record does not identify or describe the results to which Parmele referred.

In early October 1954 Parmele sent Fullam "a package containing 12 samples of Kent cigarettes, labeled from 1 to 12," representing "various treatments which we are currently trying in hopes of reducing the occurrence

of [asbestos] fiber in the smoke." Fullam was asked to examine the smoke from each sample and determine whether P. Lorillard had been successful.

In late October 1954 Parmele sent Fullam "six more lots of Kent cigarettes numbered from 13 to 18." Each lot represented a "different treatment" for eliminating asbestos fibers in the smoke. Fullam was asked to subject these cigarettes to his "regular test procedure" and inform him of the results.

In a December 1954 letter to Harold Knudson, H&V's technical director, Parmele stated that Fullam's "data" made "very little sense," and Parmele questioned the advisability of sending him further cigarette samples, particularly in light of P. Lorillard's intention to eliminate the use of asbestos in the near future. Again, the record does not explain the "data" to which Parmele referred.

Electron microscopist Douglas Hallgren worked with Fullam from 1954 until 1964 and was involved in the Kent cigarette experiments. The purpose of the project was to determine how much of the asbestos component of the filter was emitted during the smoking process. He and Fullam conducted their examinations of the samples in the same way. Hallgren testified that Fullam had created a procedure and an apparatus whereby the cigarettes could be smoked in a manner which "simulated a person smoking." He and Fullam made certain there was no cross-contamination between the cigarette samples. They then made photomicrographic plates of the collected materials, and Hallgren made photographic prints of all the plates. Procedures existed to avoid contamination of the films prepared. Prior to Hallgren's working at

Fullam's laboratory, Fullam created two control photographs by extracting and photographing asbestos particles from a Kent filter cigarette (exhibits 44 and 45). Hallgren understood that these control photographs were used as reference points for the asbestos particles they were looking for in Kent cigarette smoke. Although Lorillard was unable to produce any written reports from the Fullam experiments, Hallgren stated that he and Fullam would have prepared and sent P. Lorillard reports on a regular basis at the end of testing each group of samples.

Hallgren testified that he recognized several particular electron micrographs of material collected from sample number 2, which the July 20, 1954, letter described as "regular Kents." Those particular micrographs showed small clusters of asbestos fibers.

From his work with Fullam, Hallgren concluded that asbestos fibers were being "extracted from the cigarettes" during the smoking process, and the source of asbestos recorded on the electron micrographs came from the cigarettes. This conclusion was supported by the "overwhelming" number of "clearly asbestos" particles found, which could not have been attributed to contamination.

On cross-examination Hallgren stated that only a small number of cigarettes were smoked to collect the sample material. Each cigarette was smoked for "a few, five minutes." No written protocol was created, but the same procedures were used with each sample. All samples tested came from P. Lorillard with sample numbers attached. Some of the cigarettes were loose, and others were in packages affixed with the Kent logo. "[S]ome" or

"[a] great many" were experimental variations. He and Fullam did no testing to determine whether the asbestos particles found came *from* the cigarette or *through* the cigarette.

Hammar was shown several Fullam micrographs and testified that they depicted crocidolite asbestos fibers.

In particular, appellants contend the Fullam tests were irrelevant because there is no evidence that: (1) the Kent cigarettes smoked to produce the photomicrographs were those publicly available; (2) the structures visible in the micrographs are in fact asbestos; and (3) any asbestos shown in the micrographs came from the Kent filters as opposed to from outside contamination.

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The admission of demonstrations, experiments and tests is a matter of discretion for the trial court and will not be reversed on appeal absent a clear abuse of that discretion. (*Culpepper, supra,* 33 Cal.App.3d at p. 522.)

We conclude the evidence was relevant. P. Lorillard commissioned Fullam to study the presence of asbestos particles released into the smoke from Kent filter cigarettes in "normal use." Hallgren testified that he and Fullam tested at least some experimental Kent cigarettes, reasonably permitting the inference that some of the Kent cigarettes tested were nonexperimental. The test procedure simulated normal smoking, and there is substantial evidence that procedures were taken to eliminate contamination. Hallgren and Hammar both opined that asbestos was depicted in the micrographs and Hallgren

opined that asbestos was emitted in the Kent cigarette smoke, confirming earlier testing by Revere and Farr. Finally, appellants offered no evidence that the cigarettes tested were not those sold to the general public.

B.

Appellants maintain that even if Fullam's test conditions were relevant, his photomicrographs were not properly authenticated. "To authenticate a photograph, a foundation must be laid by showing that the picture is a faithful representation of the objects or persons depicted. The showing must be made by a competent witness who can testify to personal knowledge of the correctness of the representation." (2 Witkin, Cal. Evidence (3d ed. 1986) Demonstrative, Experimental and Scientific Evidence, § 840, p. 806.) The photographer's testimony is not necessary to authenticate a photograph. (*Adams v. City of San Jose* (1958) 164 Cal.App.2d 665, 667.) Whether or not a photograph is sufficiently authenticated is a matter within the discretion of the trial court and its decision will be upheld absent an abuse of discretion. (*Id.* at pp. 667-668.)

Appellants argue that (1) the two control micrographs (exhibits 44 and 45) were prepared by Fullam before Hallgren started working with him and when Hallgren was not present, and no evidence was presented that they contained asbestos fibers from publicly available Kent cigarettes; (2) there is no evidence Hallgren was present when the photomicrographs were allegedly made during experiments with "sample 2" (exhibits 47-50), he could not testify that the sample was taken from smoking

sample 2 cigarettes, and no evidence was offered that the photomicrographs are fair representations of what they purport to show; and (3) no evidence was offered as to who tested "sample 5 from the November series" or that the micrograph depicted in exhibit 52 fairly represented what it purports to show.

Appellants' argument is unpersuasive. Hallgren testified that the control photomicrographs show asbestos fibers extracted from Kent cigarettes. For control purposes they need not have been the publicly available cigarettes – their only purpose was to demonstrate the appearance of asbestos fibers. He further testified that he and Fullam utilized "exactly" the same technique in examining the cigarette samples, and that exhibits 47-50 are representative of asbestos fibers extracted from sample 2 regular Kent cigarettes. Hallgren testified extensively as to his and Fullam's method of storing and labeling the photomicrographs and record-keeping procedure, and that no one else utilized the laboratory.

Given Hallgren's extensive involvement in Fullam's project and their use of identical techniques in conducting the experiments and creating and storing the photomicrographs, the trial court did not abuse its discretion in determining the photomicrographs were adequately authenticated. Even assuming the photomicrographs were improperly authenticated, any error in their admission is harmless, since the Revere/Farr and Longo studies (see part II, *infra*) established that asbestos was released from appellants' cigarettes during smoking.

II

Appellants next contend the court erred in admitting testimony and exhibits regarding experiments conducted by Dr. William Longo.

At trial appellants moved in limine to exclude evidence of the Longo experiments on the grounds that (1) the cigarettes used are not representative of samples sold between 1952 and 1956; and (2) Longo's first experiment, MAS1,[2] utilized a nonautomated smoking machine which did not replicate average human smoking. During Longo's testimony appellants interposed a general "foundational" objection thereto, without specifying more.

On appeal appellants contend (1) there was no evidence that the samples tested and the manner in which they were tested were substantially similar to the manner in which Milton smoked Kent cigarettes; (2) the experiments were irrelevant because Longo failed to test a statistically significant sample, making it impossible to generalize his results; and (3) the experiments did not meet the standards for admissibility of new scientific techniques under the *Kelly/Frye* standard. (See *People v. Kelly* (1976) 17 Cal.3d 24 *(Kelly); Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 *(Frye).*) Appellants further contend Longo was not qualified to offer testimony regarding the scientific consensus on his methods and was not impartial because his experiments were paid for by attorneys, and the experiments did not utilize correct scientific procedures.

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[2] MAS is an abbreviation for Longo's company, Materials Analytical Services.

Longo has a Ph.D. in engineering and material science, and is an electron microscopist and president of MAS, specializing in asbestos analysis. In mid-1989 John Slade, M.D., asked Longo to analyze some "original" Kent filter cigarettes to determine whether and in what concentration they contained asbestos. Slade provided Longo with four or six packs of unopened Kent cigarettes in their "original condition." The cellophane was intact, there was no observable damage or discoloration, and the foil under the cellophane was intact. Packs one and two were original Kents from 1954 or 1955. Some of the other packs were cigarettes produced in the 1960's and 1970's.

In 1989 Longo visually examined some original Kent cigarettes from 1952, and determined they were "the same" and in the same condition as those from 1955. Electron microscopy of the unsmoked filters revealed no deterioration or degradation of any component. Although Longo did not know the precise history of the cigarettes Slade provided, there was no evidence of degradation, and he opined the cigarettes were in "excellent condition." He determined the cigarettes had lost some humidity over the 40-year period, and restored them using a protocol published in an article he found in a 1952 issue of the Journal of the American Medical Association. The dehydration and subsequent rehydration were unlikely to cause the release of asbestos fibers.

In June 1991 Longo performed an experiment (MAS1) to determine if crocidolite asbestos was released from original, 40-year-old Kent cigarettes during smoking. The experiment was paid for and videotaped by attorneys. Longo designed and utilized a hand-held, nonautomated smoking machine in which a syringe was modified to

hold a vertically positioned cigarette. Twelve cigarettes were tested in MAS1, although only nine were actually smoked. Six of the nine smoked cigarettes were pinched and rolled between the fingers to simulate what people sometimes do when smoking. To create a laboratory control, the MAS1 test was also run using "new" cigarettes not containing asbestos, and run without cigarettes in the apparatus. Each cigarette tested had two "puffs" taken, simulated by pulling back the syringe. After each puff the cigarette was allowed to remain vertical in the syringe to let the smoke dissipate. Some cigarettes stayed in the syringe for a day or two between the two puffs. Thereafter the syringe was filled with water and shaken to help distribute the particles evenly through the solution. Using electron microscopy, crocidolite fibers were counted after each puff.

The range of crocidolite asbestos structures released varied from 469 to 12,142 structures per cubic centimeter. The cigarettes that had not been manipulated before insertion into the syringe had lower asbestos concentrations, and the cigarette that took the longest time to place into the syringe barrel had the lowest asbestos concentration. Longo could not explain why one or two chrysotile asbestos fibers were found in the control cigarettes which did not contain crocidolite asbestos. The MAS1 study went through a peer-review process and was published in Cancer Research in June 1995 in an article entitled *Cross Asbestos Fibers in Smoke From Original Kent Cigarettes.*

In December 1993 and September 1994, after MAS1 was criticized because it did not utilize an automated smoking machine, Longo tested three additional Kent

filter cigarettes from two different 40-year-old packs utilizing an automated smoking machine (MAS2). One cigarette was tested in December 1993 and two were tested in September 1994. The smoking machine, obtained from the American Health Foundation, a governmental agency, was originally designed to test for tar and nicotine, and was calibrated according to Federal Trade Commission protocols. The tested cigarette was left in the machine and smoked for eight puffs over an eight minute time span to a specified length. After the smoke was collected and tar and nicotine were filtered out, the resulting samples were analyzed by electron microscopy according to the same "EPA"[3] protocol used in MAS1. Like MAS1, MAS2 demonstrated that crocidolite asbestos was released from the original Kent cigarettes during smoking. Between 43.1 and 119.3 crocidolite asbestos structures per cubic centimeter were released. Both MAS1 and MAS2 revealed a "large release of crocidolite asbestos."

Longo attributed the variation in asbestos quantities between the two MAS studies to (1) the possibility of reduced release in MAS2 due to a buildup of tar and nicotine in the automated smoking machine, or (2) the uneven distribution of asbestos in the Kent cigarettes themselves. Longo said it was unclear whether MAS1 or MAS2 was more representative of the quantity of asbestos released than that released through the actual smoking experience.

On cross-examination Longo stated he was unaware of where the cigarettes used in MAS1 or MAS2 had been

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[3] Environmental Protection Agency.

or how they had been stored from the time of their manufacture until he obtained them from Slade. The cigarettes tested in MAS2 had been in open cigarette packs since 1991. Other than visually comparing the tested cigarettes with other 40-year-old cigarettes provided by Slade, Longo did nothing to determine whether they had changed over time. Some of the nonoriginal Kent cigarettes provided by Slade did appear to have changed over time, but the asbestos-containing original Kents were "perfect" when opened. Longo believed that MAS1 could be reproduced and similar results would be obtained.

Hammer testified that Longo's article in Cancer Research was sufficiently trustworthy to be relied on for the basis of his opinion that Kent cigarettes were the most likely source of the asbestos that caused Milton's mesothelioma. After discussions with another expert in asbestos analysis, Hammar concluded that the conclusions reached in Longo's article were scientifically valid. Hammar stated that Longo's laboratory had been approved by the government to conduct asbestos fiber analysis, and such approval was subject to "very high standards."

As to the *Kelly/Frye* issue raised by appellants on appeal, we preliminarily note that appellants did not specifically raise this issue before the trial court, either in their pretrial written motion in limine to exclude evidence of the Longo experiments, or otherwise in their general foundational objection, as required by Evidence Code section 353, subdivision (a) if the issue is to be preserved for appeal. (See, e.g., *People v. Mattson* (1990) 50 Cal.3d 826, 853-854) "Specificity is required both to enable the court to make an informed ruling on the

motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. [Citations.]" (*Id.* at p. 854.) Respondents do not challenge appellants' failure to make a specific *Kelly/Frye* objection below, but instead contend *Kelly/Frye* does not apply because Longo "did not rely upon a sophisticated new scientific technique to demonstrate a novel conclusion." Although appellants appear not to have properly preserved the issue for appellate review, assuming they did, we see no error.

The admissibility of expert evidence regarding new scientific techniques is governed by *Kelly, supra,* 17 Cal.3d 24, which adopted the rule in *Frye, supra,* 293 F. 1013. (See also, *People v. Leahy* (1994) 8 Cal.4th 587.) First, "the reliability of the method must be established, usually by expert testimony." (*Kelly, supra,* 17 Cal.3d at p. 30, italics omitted.) Second, "the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject." (*Ibid.*, italics and citations omitted.) "Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case." (*Ibid.*, citations omitted.) To be reliable the technique "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." (*Ibid.*, italics omitted, quoting *Frye, supra,* 293 F. at p. 1014.)

The reliability of the method was established by both Longo and Hammar. Hammar's qualifications were never questioned. As to Longo's qualifications to render an opinion, he clearly qualified as an expert. In addition to

being an engineer and materials scientist, he is an electron microscopist and president of a laboratory specializing in asbestos analysis, and his laboratory was approved by the government to conduct asbestos fiber analysis. Appellants' contention that Longo was unqualified as an expert on cigarette smoke analysis because his experiments were funded by attorneys goes not to Longo's qualifications as an expert, but to the potential for bias. To state it another way, the funding factor does not affect the admissibility of the evidence, but its weight. Whether Longo's experiments were affected by bias due to their funding source is a question of fact for the jury, which was obviously resolved in favor of respondents.

With regard to whether correct scientific procedures were used, Longo testified that he restored the humidity to the 40-year-old cigarettes using a published protocol for rehydration. The MAS1 study was subject to a peer-review process and was published in a professional journal. The smoking machine utilized in MAS2 was obtained from a governmental agency and calibrated according to Federal Trade Commission protocols. Hammar opined that Longo's article regarding MAS1 was sufficiently trustworthy to form the basis of his opinion that Kent cigarettes were the most likely source of the asbestos which caused Milton's mesothelioma. Hammar concluded that the conclusions reached in the article emanating from MAS1 were scientifically valid, and Longo's laboratory was subject to very high standards.

Appellants did not ask Longo or any other witness whether Longo's experimental techniques were generally accepted within the scientific community, nor did they

introduce any evidence to the contrary. However, Hammar's testimony established this fact.

Consequently, assuming the *Kelly/Frye* issue was preserved for appeal, no error is demonstrated in the court's admission of the Longo experiments. The testimony by Longo and Hammar provides substantial evidence that Longo's test methods were scientifically valid, including the sample size. In addition, based on testimony by Longo and Hammar, the court could reasonably find that the conditions of the MAS1 and MAS2 studies sufficiently replicated average human smoking. Whether the cigarettes degraded was a factual question for the jury, and there is substantial evidence that they did not.

III

Appellants contend the court erred in permitting Horn to testify regarding Milton's smoking history and the reliability of that history, because it was an erroneous use of a prior consistent statement. (Evid. Code, § 791.)[4]

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[4] Evidence Code section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive, for fabrication, or other improper motive is alleged to have arisen."

Horn testified he saw Milton in December 1994 for evaluation of his mesothelioma which had been previously diagnosed. He took a routine smoking history and, because of Milton's mesothelioma, asked him what brand of cigarettes he had smoked. Prior to taking the history, Horn did not tell Milton that Kent cigarettes contained asbestos in their filters. Lorillard's counsel objected on grounds of relevance and hearsay to Horn's testimony as to the cigarette brands Milton reported having smoked. Respondents' counsel responded that the evidence "goes to [Horn's] ability to be able to rely on what he's being told by the ability of the reporter to give him information in a detailed fashion." The court ruled the evidence was admissible to the extent it formed the basis of Horn's opinion. Respondents' counsel again stated the evidence went to the credibility of the information provided to Horn upon which he relied. The court stated Horn could accept whatever Milton said as the truth. Horn then stated he accepted as truthful everything Milton told him regarding his medical, social and occupational history.

As Horn began to recite the brands of cigarettes Milton reported he had smoked, Lorillard's counsel again objected on hearsay grounds, and H&V's counsel objected: "What I think this is, is a classic example of offering a prior consistent statement before [Milton] has been rebutted. They want to put [Milton]'s statements in evidence before he's impeached by those statements, and I don't think that's proper." The court responded by directing respondents' counsel to limit questions to Horn's diagnosis and treatment. Horn then testified that Milton told him he began smoking Kent filter cigarettes in February 1952, and smoked about one pack per day until he

stopped smoking in January 1963. Subsequently, respondents' counsel asked Horn whether the smoking history Milton provided was reliable. H&V's counsel objected on the ground that in essence, Horn was improperly being asked whether Milton was telling the truth. When respondents' counsel rejoined that was not the purpose of her question, the court sated, "You may ask. Overruled." Horn testified that the smoking history Milton provided was "very reliable."

Lorillard's "prior consistent statement" objection was misplaced. The prior consistent statement exception to the hearsay rule operates only where there is an attempt to introduce a prior statement of a witness that is consistent with his present testimony (Evid. Code, §§ 791, 1236), and Milton had not yet testified. To the extent any objection was based on hearsay, a medical history taken from a patient by a physician and used to diagnose, treat or to support a professional opinion, is a recognized exception to the hearsay rule. (Evid. Code, § 801, subd. (b); *People v. Stoll* (1989) 49 Cal.3d 1136, 1155; *People v. Wilson* (1944) 25 Cal.2d 341, 348; *Johnson v. Aetna Life Insurance Co.* (1963) 221 Cal.App.2d 247, 252.)

Horn's opinion that Milton's recitation of his medical history was reliable, was inadmissible. Although Horn could properly testify that he relied upon Milton's smoking history in rendering his diagnosis and treatment, and that Milton's condition and symptoms were consistent with the smoking history provided, Horn could not offer an opinion that Milton's smoking history was reliable, i.e, that it was truthful. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 788-789 (*Grimshaw*).) In response to defense counsel's objection, respondents' attorney stated

merely that she did not intend to elicit Milton's smoking history to establish its truth; she failed to state any ground to support Horn's opinion that Milton's smoking history was reliable. Respondents also fail to provide any justification in their appellate briefs.

However, we conclude the error was harmless, because the court properly instructed the jury on the use of this testimony. The jury was instructed that "Evidence has been received that the plaintiff made statements to a physician for the purpose of diagnosis or treatment. That evidence may not be considered as proof of the truth of the facts stated; you may consider it only to the extent it does show the information upon which the physician's opinions are based." This is a correct statement of the law. (*Grimshaw, supra,* 119 Cal.App.3d at pp. 788-789.) Horn's testimony notwithstanding, Milton's credibility was still an issue for the jury. In addition, substantial evidence of Milton's smoking history came in through his own testimony and that of Shirley.

IV

Appellants next contend respondents' counsel committed misconduct during opening statement and closing argument by implying that the missing test reports regarding the Revere/Farr and Fullam studies were deliberately lost or destroyed by Lorillard, without producing evidence that written reports ever existed.

Respondents rejoin that appellants have waived this issue by failing to object below. (*Menasco v. Snyder* (1984) 157 Cal.App.3d 729, 733.) Appellants argue that no waiver occurred because during in limine motions prior

to opening statements, they informed the court that there was no evidence any written reports ever existed, and therefore plaintiffs' counsel could not assert the implication that such reports disappeared. The court agreed and reminded plaintiffs' counsel that it had to establish that such reports existed.

"Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished." (*Horn v. Atchison T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610). In reviewing claims of misconduct, "[e]ach case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances." (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 320-321, footnote omitted.)

Here, respondents attempted to preclude any mention of missing test reports unless their existence had first been established by raising the issue in the in limine hearing. However, no objection or request for admonition was tendered immediately after the allegedly improper statements were made during opening statement or closing argument, and appellants have not demonstrated that an objection at the time the statements were made would have been futile or prejudicial. In such a situation, appellants cannot sit back and do nothing to cure the possible harm and then raise the issue on appeal. (*Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal.App.3d 500, 512).

Consequently, the claim of error is waived. (See *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860, 862.)

V

Lorillard next argues that the $560,000 punitive damage award against it as the successor corporation to P. Lorillard was improper. Alternatively, and for the first time on appeal, Lorillard argues that even if punitive damages were available against it, the court erred in applying California law, and should have applied New Jersey law, the state where P. Lorillard's misconduct occurred. Finally, they argue there is no substantial evidence of its wrongdoing to support an award of punitive damages, and consequently the punitive damage award violates the federal due process clause.

Between 1952 and 1956 P. Lorillard, a New Jersey corporation, manufactured and sold Kent cigarettes with asbestos-containing filters. In April 1968 P. Lorillard "merged with and into Lorillard Corporation," a Delaware corporation. In November 1968, Loews P.L. Company, Inc., a wholly-owned subsidiary of Loews Theaters, Inc., a New York corporation, merged with and into Lorillard Corporation. Upon consummation of the merger Lorillard Corporation became a wholly-owned subsidiary of Loews Theaters, Inc. In July 1969, Lorillard Corporation merged with and into Loews Theaters, Inc. Thereafter, it operated as Lorillard, a division of Loews Theaters, Inc. In 1971 Loews Theaters, Inc., became a subsidiary of Loews Corporation and in August 1985, the name of Loews Theaters, Inc., was changed to Lorillard, Inc.

Lorillard argues that it was not until 12 years after P. Lorillard stopped producing asbestos-containing Kent cigarettes that Loews P.L. Company, Inc., "an entirely unaffiliated entity [] purchased Lorillard." Therefore, it contends, that instead of continuing P. Lorillard's business, any tortious conduct ceased by the time P. Lorillard's corporate form changed to Lorillard.

Corporations Code section 1107 provides: "(a) Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them."

In *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, Division Two of this court upheld an award of punitive damages against a successor corporation for the torts of its predecessor. *Moe* noted that punitive damages are a portion of tort liability, and that consolidation or merger "merely directs the blood of the old corporation into the veins of the new, the old living in the new," subjecting the successor to the predecessor's liability for punitive damages. (*Id.* at pp. 304, internal citations and quotation marks omitted.)

In *Marks v. Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429 (*Marks*), Division One of this court held that the acquisition of a manufacturer by a subsidiary of one of the defendants in a products liability action was a de facto merger, with all of the consequences of a statutory merger under Corporations Code section

1107. Consequently, the successor was liable for its predecessor's liabilities, including the punitive damages awarded to the plaintiff. (*Marks* at p. 1438.)

Marks rejected the analytical approach and result of *In Re Related Asbestos Cases* (N.D. Cal. 1983) 566 F.Supp. 818, wherein the defendant, Celotex, was the successor to a series of corporations whose asbestos caused the injuries complained of, and it continued to operate a division called by the original corporation's name, Philip Carey. Throughout each transaction the assets were acquired subject to the former company's liabilities. However, the final purchase by Celotex was for cash rather than by exchange, and no former stockholders became stockholders of Celotex or of any of Celotex's parent or subsidiary corporations. The district court reasoned that Celotex was not a mere continuation of Carey, since it continued to operate with its former officers and directors after acquiring Carey, no Carey shareholders became Celotex shareholders, and no culpable officers of the predecessor corporations were retained. Thus, the court held there was insufficient similarity between Carey and Celotex to warrant imposition of punitive damages. (*Id.* at pp. 821-824.)

Marks rejected the *In re Related Asbestos Cases* approach on the ground that it is the *form* of the acquisition that determines whether or not corporate liabilities are passed on to a successor corporation, not the corporate similarity or the continuity of the predecessor's product line. (*Marks, supra,* 187 Cal.App.3d at p. 1435.)

Here, the sparse evidence is that P. Lorillard merged with Lorillard, which continued its business throughout

several successive changes in corporate form. We must presume in support of the judgment that the merger was a statutory merger under Corporations Code section 1107. (See *Walling v. Kimball* (1941) 17 Cal.2d 364, 373 [all presumptions indulged to support judgment as to matters as to which record is silent]; 9 Witkin, Cal. Procedure (4th Ed. 1997) Appeal, § 348, pp. 394-396.) Based on the facts before us, we see no reason to depart from the reasoning or result in *Marks*. In addition, Lorillard has waived the choice of law issue by raising it for the first time on appeal. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 570 (*Burden*).)

Finally, the punitive damage award against Lorillard does not violate due process because as we discuss, *infra*, there is substantial evidence of Lorillard's wrongdoing to support the punitive damage award.

VI

Lorillard contends there was no substantial evidence to support the imposition of punitive damages against it because there was no evidence that P. Lorillard or anyone else was aware that use of asbestos in Kent cigarettes would probably have dangerous consequences.

Punitive damages are appropriate if "the defendant has been guilty of oppression, fraud, or malice. . . . " (Civ. Code, § 3294, subd. (a).) As used in Civil Code section 3294 " '[m]alice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." " 'Oppression' means despicable conduct that

subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(1) & (2).)

A conscious disregard for the safety of others may constitute malice if the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid such consequences. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402.)

In resolving attacks on the sufficiency of the evidence, the test is whether a review of the entire record shows substantial evidence to support the verdict or judgment, and "when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.* [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, original italics.)

We conclude substantial evidence supports the punitive damage award against Lorillard. In 1954 P. Lorillard knew that asbestos was emitted from its Kent cigarettes during the human smoking process, and told Fullam that it was anxious to have its cigarette smoke free of asbestos fiber, "as free or as pure as the air which we normally breathe." In 1954, P. Lorillard coordinated with Drs. Morris Fishbein and Samuel Pearlman, to give "physicians gift box[es]" of Kent cigarettes to a group of Chicago doctors. One such doctor, Jerome M. Silver, M.D., wrote to Pearlman in May 1954 stating, "The other

concern I have had is the effect of the asbestos which is used in the filter. There have been unofficial reports of cases of asbestos is found in people smoking Kents and said to be solely a result of such smoking. [¶] . . . [¶] I feel that as an individual, 'Kent' served my purpose, but I would like to see a scientific investigation of the effects of the asbestos contained in the filter."

Respondents' health research expert, Nicholson, testified that in the 1930's and 1940's the connection between asbestos exposure and cancer, particularly lung cancer, was demonstrated. In the 1950's there was widespread knowledge that asbestosis was related to asbestos exposure. Consequently, by the 1950's a manufacturer of asbestos-containing products would have been aware of medical literature containing asbestos and cancer.

Finally, in his deposition, Elise Comproni testified that between 1952 and 1954, while employed by the Commonwealth of Massachusetts Department of Public Health involved in air sampling and ventilation control, he made several visits to H&V's plant to evaluate potential health hazards. At that time asbestosis and lung cancer were known effects of exposure to asbestos, and Comproni discussed such hazards with H&V's plant manager and foreman. At that time Comproni was "appalled" that asbestos was being used in cigarette filters because "asbestos is a known carcinogen causing asbestosis and lung cancer and to put it in a product that you are actually breathing air from is not in keeping with the best health practices."

The February 1952 agreement between P. Lorillard and H&V states their "desire to exploit the joint ownership of the processes and/or of the inventions" and utilize their "mutual 'know-how' " regarding development and production of an asbestos-containing filter cigarette. The agreement defines "mutual 'know-how,' " as "all information and data, knowledge and technique of every kind and description in each party's possession, or acquired by it during the term of this agreement." Thus, pursuant to the agreement it may be reasonably inferred that Lorillard knew or should have known whatever H&V knew or should have known as to the health affects of its asbestos-containing filter cigarettes.

Such evidence is sufficient to show that in the 1950's P. Lorillard knew or should have known that smoking asbestos-containing filter cigarettes could result in irreversible and fatal asbestos-related illness.

VII

H&V contends the court erred in submitting respondents' fraud claim against it to the jury, because the first amended complaint did not allege fraud against it, respondents did not amend their complaint to do so, and not until the parties rested did respondents indicate an intent to allege fraud against it.

The seventh cause of action entitled "FRAUD," and alleged solely against Lorillard states, in relevant part, that despite its knowledge that crocidolite asbestos fibers were a "respiratory hazard," Lorillard produced asbestos-containing Kent filter cigarettes and (1) misrepresented to [Milton], the public and the medical profession that its

Kent cigarettes were safe, merchantable and fit for their intended use; (2) induced the public to smoke its cigarettes based upon the health, safety and protection afforded by the filter's design; and (3) encouraged the medical profession, through advertisements and demonstrations at medical conventions, to recommend Kent cigarettes based upon the health, safety and protection due to the filter's design. It also alleged that Milton detrimentally relied on Lorillard's advertisements in changing his brand of cigarettes to Kent in 1952 and in remaining "brand-loyal" to Kent cigarettes until approximately 1962.

The fifth cause of action entitled "PUNITIVE DAMAGES," alleged against both Lorillard and H&V, incorporates by reference the seventh cause of action. In addition, it alleges that appellants researched, tested, manufactured, and marketed their asbestos-containing products in conscious disregard for the safety of the product's users, given appellants' "specific prior knowledge that there was a high risk of injury or death resulting from exposure to asbestos or asbestos products, including but not limited to, lung cancer and other forms of cancer, and asbestosis." It also alleges that appellants intentionally failed to reveal their knowledge of the high risk of injury or death resulting from exposure to asbestos and asbestos products, and "consciously and actively concealed and suppressed said knowledge" from members of the general public. Finally, it alleges that appellants' conduct was "willful, malicious, outrageous, and in conscious disregard and indifferent" to the health and safety of persons, including respondents.

The court properly instructed the jury on intentional misrepresentation, negligent misrepresentation and fraudulent concealment, and also that unless otherwise stated, the instructions given applied to each defendant. More than half of the twenty-four special verdict questions pertained to elements of fraud and the jury found fraud as to both Lorillard and H&V. The jury specifically found that: (1) H&V made a representation as to a past or existing material fact; (2) the representation was false; (3) H&V made the representation recklessly without knowing whether it was true or false, and without any reasonable grounds for believing it to be true; (4) H&V made the representation with an intent to defraud Milton; and (5) H&V intentionally concealed or suppressed a material fact with the intent to defraud Milton. The jury also found that Milton detrimentally relied on H&V's representation, would have acted in a different manner had he known of the concealed or suppressed fact, and was damaged due to H&V's misrepresentation and concealment or suppression of the material fact. The jury answered "Yes" after the name H&V to the question: "Do you find by clear and convincing evidence that any defendant was guilty of malice, oppression or fraud in the conduct on which you base your finding of liability?"

A complaint is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties and requests that the rights and duties of the parties be adjudged by the court. (*Minor v. Municipal Court* (1990) 219 Cal.App.3d 1541, 1548.) The incorporation by reference in a cause of action of factual allegations contained in another cause of

action is permissible. (See *Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 638-639.)

The elements of fraud which give rise to the tort action for deceit are (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 857-858.) To establish a cause of action for fraud, a plaintiff must plead and prove, factually and specifically, all of the elements of the cause of action. (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156.)

We conclude the complaint sufficiently pleads a cause of action for fraud against H&V. At the very least, the complaint alleges that H&V intentionally concealed its knowledge of the high risk of injury or death resulting from exposure to asbestos and asbestos products, and "consciously and actively concealed and suppressed said knowledge" from members of the general public.

VIII

H&V argues there is no substantial evidence to support the award of punitive damages against it.

Knudson, H&V's technical director and holder of the Kent Micronite filter patent, testified in his deposition that in the 1952 to 1954 period he was aware that inhalation of asbestos dust was "not desirable," and involved some risk. At the time he was "only vaguely" familiar with the term "asbestosis," but knew it resulted from inhalation of asbestos dust.

A December 1954 letter from Knudson to P. Lorillard's Parmele noted receipt of two letters "pertaining to the problem of anchoring the asbestos in the present micronite furnish." Knudson also noted his awareness of Fullam's findings.

As previously noted, Comproni told H&V that asbestos was harmful, and was appalled that it was being used in cigarettes. Finally, as we previously stated, the February 1952 agreement between P. Lorillard and H&V reasonably permits the inference that H&V may be charged with whatever knowledge Lorillard possessed regarding the health risks associated with inhalation of asbestos. Taken together the foregoing constitutes substantial evidence that H&V acted with malice, oppression and/or fraud sufficient to support the punitive damage award.

IX

H&V argues that respondents "should not have been allowed to meet their burden of proving causation solely by reference to a bare statistical inference." It argues that proof of causation was based solely on impermissible statistical inference and not on reliable scientific evidence that the level of Milton's claimed exposure to asbestos by smoking Kent cigarettes was sufficient to cause his mesothelioma.

Respondents properly rejoin that H&V has waived this issue on appeal by failing to object below to respondents' experts' opinions on the ground they were based on improper statistical inferences. (Evid. Code, § 353; *Burden, supra,* 2 Cal.4th at p. 570.) In addition, there is

substantial evidence to support the jury's finding that Milton's mesothelioma resulted from his exposure to asbestos through smoking Kent cigarettes. "In a personal injury action, causation must be proven within a reasonable medical probability based on expert testimony; a mere possibility is insufficient. [Citation.] A possible cause becomes 'probable' when, in the absence of other reasonable causal explanations, it is more likely than not the injury resulted from its action. [Citation.]" (*Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 476.)

In this case respondents' experts testified that Milton's exposure to the crocidolite asbestos-containing Kent cigarettes was the most intense exposure in his lifetime and was sufficient to cause his mesothelioma. The jury obviously found that Milton's exposures to asbestos other than that contained in the Kent cigarettes were not legal causes of his injury.

X

The jury awarded Milton $700,000 in noneconomic damages defined by the court as "subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering [and] emotional distress. . . . " Appellants contend that Milton's death during the pendency of this appeal requires reversal of his noneconomic damage award pursuant to Code of Civil Procedure section 377.34 which provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death,

including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and *do not include damages for pain, suffering, or disfigurement.*" (Italics added.)

This issue has been resolved adversely to appellants by the Supreme Court's recent decision in *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288.

DISPOSITION

The judgment is affirmed. Costs to respondents.

HANING, J.

We concur.

PETERSON, P.J.

JONES, J.

Milton Horowitz et al. v. Lorillard, Inc., et al. (A072695)

PROCEEDINGS IN THE SUPERIOR COURT
OF CALIFORNIA FOR THE CITY
AND COUNTY OF SAN FRANCISCO

SEPTEMBER 15, 1995

[p. 1] THE COURT: This is the matter of Milton and Shirley Horowitz against Raybestos-Manhattan.

And I guess the first issue deals with punitive damages. I guess there was a motion in limine to permit punitive damages to be determined by the jury, and I guess we did it by stipulation and agreement that the jury could decide the issues, and if they awarded, we would make a determination whether or not it was appropriate in view of the facts that these are successory corporations who are actually the defendants.

MR. SCHOLL: That's it, essentially, Your Honor. You recall Mr. Ohlemeyer submitted a brief at the end of the evidence. Plaintiff's counsel was allowed the time to respond and there was a reply.

It's not my intention to reargue those matters, but simply by my papers to bring the issues to the court's attention for determination so that we could get on essentially for getting judgment entered.

THE COURT: Yes. So the matter is submitted?

MR. SCHOLL: Yes.

MS. CHABER: Your Honor, you received all the papers?

THE COURT: Yes, I believe I did.

MS. CHABER: Matter submitted.

THE COURT: I don't know what the exact motion is, but in any event, I think I should let the verdict stand and let [p. 2] punitive damages stand. I think it is appropriate legally for them to have considered the question. And since they have awarded them, that is the decision, I confirm it or affirm it.

MS. CHABER: Thank you, Your Honor.

* * *

RT 9/15/1995, 1:4-2:5

First Appellate District, Division Five, No. A072695
S064550

IN THE SUPREME COURT OF CALIFORNIA

MILTON HOROWITZ Et Al., Respondents

v.

LORILLARD INCORPORATED Et Al., Appellants

(Filed Nov. 12, 1997)

Appellants' petition for review DENIED.

Chin, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice